IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 344 OF 1987

Khanderao Chandu Gaikwad (deceased)

1. Smt. Hausabai Khanderao Gaikwad;
2. Ramchandra Khanderao Gaikwad;
3. Sakharam Khanderao Gaikwad;
4. Kum Chandrabhaga Khanderao Gaikwad;
5. Smt. Nalini Ashok Jadhav.

...Appellants (Ori. Defts.)

Versus

1. Shri. Vithoba Laxman Dalvi;
2. Smt. Chandrabhagabai Laxman Dalvi;
3. Smt. Indubai Krishna Chavan;
4. Smt. Sitabai Parshuram Kadam;

*5. Shri. Bhiku Balaji Gaikwad;
(* Deleted vide Addl. R's order dated 18.7.1986 in C.A. 4107/85)

6. Shri. Barku Balaji Gaikwad;

*7. Smt. Krishnabai Balaji Gaikwad;
(* Deleted vide Addl. R's order dated 11.1.86 in C.A.4107/85).

*8. Smt. Babibai Ramchandra Jagtap
(* Deleted);

9. Shri. Jaising Chandru Gaikwad;
10. Smt. Parvatibai Hari Gaikwad;

*11. Shri. Raghunath Hari Gaikwad;

(* Deleted vide Addl. R's order
dated 19.9.1986 in C.A. 4107/85)

12. Kum. Asha hari Gaikwad;

13. Shri. Ashok Hari Gaikwad;

14. Shri. Vishnu Laxman Dalvi; ...Respondents.

(Nos. 1 to 4 Ori. Plaintiffs,
Nos.5 to 8 Org. Defts.,
1 to 4 Nos. 9 to 14 Ori. Defts.
6 to 11.)

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Mr. Dushant Purekar i/b Rajiv L. Patil, Advocate for the Appellants.

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CORAM: A.S. OKA, J.

DATED: 12TH JANUARY, 2005

ORAL JUDGMENT:-

1. This Second Appeal was admitted on 2.11.1987 by observing that the substantial questions of law are set out in ground Nos. 5, 6, 8 and 9. The said grounds read thus:-

5. The substantial question of law is that the Appellate Court having held that the Plaintiffs do not prove that the alienation of the suit properties by Balaji was for legal necessity or for the benefit of the estate, was in legal error in decreeing the suit dismissed by the trial Court.

6. The substantial question of law is that the Appellate Court has ignored the position of law that the secondary evidence is permissible only when there is sufficient proof of the search for the original and in this connection a clear finding of the trial Court is erroneously set aside.

8. The substantial question of law is that the Appellate Court has not correctly and properly considered the provisions of law of the Indian Evidence Act and Indian Registration Act as are applicable in regard to the certified copy of the original sale deed produced alongwith the list of document, in regard to the proof of its contents, attestation and execution.

9. The substantial question of law is that the Appellate Court has ignored that in this case only the signature of Balaji over the sale deed at its highest is proved and beyond this no other attempt is made by the Plaintiffs.

2. This Second Appeal is preferred by the legal representatives of Original Defendant No.5 Khanderao. The Respondent Nos. 1 to 4 are the original

Plaintiffs. It is the case of the Respondent Nos. 1 to 4 that by a registered sale deed dated 20.2.1975, from Balaji, the deceased father of the Respondent No.5/original Defendant No.1, Respondent Nos. 1 to 4 purchased the suit lands. It is the further case of Respondent Nos. 1 to 4 that deceased Balaji sold the suit lands for legal necessity. It is contended that the suit lands were sold by deceased Balaji for discharge of family debts. The Respondent Nos. 1 to 4 filed suit for declaration of ownership and permanent injunction. In the alternative the Respondent Nos. 1 to 4 prayed for general partition of the suit lands.

3. The suit was resisted by the predecessors of Appellant Khanderao by filing his written statement. In the written statement, it was contended that the suit lands were forming a part of joint family properties held by Balaji and other members of family. It was denied that the sale was effected by deceased Balaji for legal necessity. It was further contended that the deceased Balaji had no authority to sale the suit lands, therefore, the Respondent Nos. 1 to 4/Plaintiffs are not entitled to claim any right, title or interests in respect of the suit lands.

4. The trial Court dismissed the Suit. The trial

Court held that deceased Balaji was ‘Karta’ and Manager of joint family. The trial Court held that Respondent Nos.1 to 4 have failed to prove that deceased Balaji sold the suit lands for legal necessity. The learned Trial Judge also considered the prayer made by Respondent Nos. 1 to 4 in the alternative and rejected the same. The learned trial Judge held that the original sale deed was not produced by Respondent Nos. 1 to 4 and what was produced was a certified copy of the alleged sale deed. The learned trial Judge held that the Respondent Nos. 1 to 4 have not led any evidence to show that sufficient efforts were made to produce the original sale deed. The learned trial Judge proceeded to hold that the certified copy of original sale deed was not admissible as a secondary evidence.

5. Respondent Nos. 1 to 4 preferred an appeal against the decree of the trial Court before the District Court. The learned District Judge confirmed the finding of the trial Court that Respondent Nos.1 to 4 have failed to prove that the alienation was made by deceased Balaji for legal necessity. The learned District Judge, however, held that the copy of sale deed executed by deceased Balaji was admissible as a secondary evidence of the sale deed and the sale deed has been duly proved. The learned District Judge, therefore, held that the Respondent

Nos.1 to 4 have purchased undivided 1/6th share of deceased Balaji. The learned District Judge, therefore, proceeded to pass the decree for partition and separate possession and in terms of prayer made by Respondent Nos.1 to 4 in the alternative.

6. The learned counsel appearing for the Appellants submitted that the evidence on record shows that Respondent Nos. 1 to 4 did not make any efforts to search the original sale deed. He submitted that there was no evidence to substantiate the case made out by Respondent Nos.1 to 4 of handing over the original sale deed to the Talathi for effecting mutation entry in their names. He submitted that in absence of any such evidence being led by the Respondent Nos. 1 to 4, Certified copy of the sale deed could not have been admitted as a secondary evidence. He submitted that assuming that the execution of the sale deed in favour of Respondent Nos. 1 to 4 made by deceased Balaji is proved, however, the contents of the sale deed are not proved. He, therefore, submitted that contents of the sale deed are not proved in accordance with law and therefore, Respondent Nos. 1 to 4 cannot claim any right, title or interest on the basis of the said sale deed. He lastly submitted that as the Respondent Nos.1 to 4 have no right, title or interest in the suit lands, the decree for partition

could not have been passed.

7. I have considered all the submissions made by the learned counsel appearing for the Appellants. The appellate Court has placed reliance on the decision of **Privy Council in the case of Basant Sing Vs. Brijraj Saran (A.I.R. 1935 Privy Council 132).** In the said case Privy Council held that when the existence of original could not be in doubt, the evidence to show that the original was not seen for many years was sufficient to prove its loss. The Privy Council also dealt with the case of a registered document. In paragraph 8 of the judgment, the learned District Judge on evidence recorded the finding that the existence of the original sale deed cannot be disputed. The learned Judge, therefore, held that as Respondent Nos.1 to 4 have established that the original was not seen for many years, it was sufficient to prove that the original sale deed was lost. The finding recorded by the learned District Judge is based on the evidence on record and I find no perversity in the said finding. If the said finding cannot be disturbed, then question which arises is whether secondary evidence in the form of certified copy of the sale deed is admissible. The certified copy shows that there was an endorsement made by the Registering Officer as contemplated by the Indian Registration Act, 1908 and the said

endorsement shows that the sale deed was duly executed and registered. The said endorsement also shows that Balaji, the executor of the said sale deed received an amount of Rs.1,400/- (Rupees One thousand four hundred only) in the presence of the Sub-Registrar. The endorsement further shows that deceased Balaji has signed the sale deed and his thumb impression was also obtained on the said sale deed. Once it is accepted that the original sale deed was lost, it is obvious that the certified copy of a document which is duly registered under the Indian Registration Act, 1908 was admissible as a secondary evidence of the original document. In my view, no fault can be found with the finding of the appellate Court that the certified copy of the sale deed deserves to be accepted as a secondary evidence of the sale deed. Therefore, the appellate Court held that the certified copy of the sale deed was admissible in evidence.

8. Once the document is duly admitted in evidence, the contents of the said document will have to be read in the evidence. What is established on the evidence is a factum of the execution of the sale deed by deceased Balaji and receipt of consideration of Rs.1,400/- by him in presence of the Sub-Registrar. The learned District Judge considered the evidence on record and has recorded the finding

that the contents of the sale deed have been proved. In Second Appeal under Section 100 of Civil Procedure Code, 1908 it is impossible to upset the said finding which is based on the evidence.

9. All that the Appellate Court has done is that a share has been granted to Respondent Nos. 1 to 4 on the basis of the sale deed executed by deceased Balaji. Once, it is held that the sale deed was executed by deceased Balaji, the said sale deed will affect the undivided share held by deceased Balaji. No issue is raised about the finding recorded by the learned District Judge that deceased Balaji had 1/6th undivided share. In this view of the matter, no fault can be found in decree for partition passed by the Appellate Court. There is no substantial question of law. Second Appeal is dismissed with no order as to costs.